90-247

No. —

In the

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL H. OVERMYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented for Review

1. Under *Kastigar v. United States* and the Fifth Amendment, may the government meet its burden of demonstrating non-use of immunized testimony by merely identifying a potential independent source for its evidence, without more—or must the government go further, and affirmatively establish that its evidence was in fact derived from the claimed source, by identifying its grand jury and trial evidence and establishing that each item of evidence was in fact derived from the claimed independent source?

2. When the government induces a witness to testify by guaranteeing that none of his testimony will be used "directly or indirectly" against him and then breaches that promise by using evidence derived from the immunized testimony to prosecute the witness, may the government avail itself of the harmless-error rule in order to sustain a resulting conviction?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on March 26, 1990, which affirmed petitioner's judgment of conviction.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit concerning which this Court's review is sought is reported at *United States v. Overmyer*, 899 F.2d 457 (6th Cir. 1990), and is reproduced in the Appendix hereto.

The trial court's opinion, denying petitioner's pre-trial motion, was filed on October 14, 1986, in *United States v. Overmyer*, Docket No. CR.86-13, U.S. District Court, Northern District of Ohio, and is not reported. This opinion is reproduced in the Appendix hereto.

Jurisdictional Statement

Petitioner requests this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 26, 1990. Petitioner's petition for rehearing

and suggestion for rehearing *en banc* was denied by an order entered May 10, 1990. This petition is being filed within the time permitted by Rules 13.1 and 13.4 of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 7a(10) of the former Bankrupty Act (former 11 U.S.C. Section 25(a)(10)) provided:

Duties of bankrupts

> (a) The bankrupt shall . . . (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or

> indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: *Provided, however,* That when the bankrupt is required to attend for examination, except at the first meeting and at the hearing upon objections, if any, to his discharge, he shall be paid actual and necessary traveling expenses for any distance in excess of one hundred miles from his place of residence at the date of bankruptcy: *And provided further,* That the court may for cause shown, and upon such terms and conditions as the court may impose, permit the bankrupt to be examined at such place as the court may direct whether within or without the district in which the proceedings are pending. . . .

Title 18 United States Code Section 152, paragraph 4, provides:

Concealment of assets; false oaths and claims; bribery

> Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy or attorney; . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case

Daniel H. Overmyer, 65 years old, a Toledo, Ohio, native with no criminal record, was indicted on January 28, 1986, in the Northern District of Ohio, on nine courts of bankruptcy fraud. Following a trial before the Honorable Sam H. Bell, U.S. District Judge, and a jury, commencing on October 15, 1986, and terminating on November 21, 1986, Overmyer was acquitted of eight of the nine counts. Overmyer

was convicted of one count of violation of 18 U.S.C. Section 152, paragraph 4, which prohibits knowingly presenting a false proof of claim in bankruptcy.[1] On July 21, 1989, Overmyer was sentenced to six months' imprisonment, followed by three years' probation, and a $5,000 fine. Overmyer was granted bail pending appeal. On March 26, 1990, the Sixth Circuit affirmed Overmyer's conviction. A petition for rehearing *en banc* was denied on May 10, 1990. A stay of the mandate was granted on June 12, 1990.

The Indictment

Count one of the indictment, on which Overmyer was convicted, charged that he caused a company which he controlled, Hadar Leasing International Company, Inc. ("Hadar") to present, on August 7, 1981, a $859,481.80 proof of claim in the Chapter 11 proceeding of D.H. Overmyer Telecasting Company, Inc. ("Telecasting"), a company which Overmyer had formerly controlled. The proof of claim was based on various equipment leases in effect between Hadar and Telecasting. (From 1976 through 1981 Telecasting leased all of its broadcast and other operating equipment from Hadar, an affiliated leasing company.)

The indictment alleged that the Hadar-Telecasting leases were shams, designed solely for the purpose of transferring money out of Telecasting to other Overmyer-controlled entities. The indictment alleged that, commencing in January 1976, Overmyer devised a scheme whereby he "caused Telecasting to make payments on these and various other leases with Hadar which had the effect of transferring monies from Telecasting to Hadar for no apparent consideration." (Indictment, paragraph 10) The indictment further alleged that Overmyer defrauded Telecasting through the creation of fictitious "service companies" which he controlled, and

[1] The district court granted Overmyer's post-trial motion for entry of a judgment of acquittal pursuant to Rule 29(c) on April 22, 1987, On February 10, 1989, the Sixth Circuit reversed the district court and reinstated the jury verdict. *United States v. Overmyer*, 867 F.2d 937 (6th Cir. 1989).

which received various monies from Telecasting, purportedly for providing management and other services to Telecasting. The government alleged that no such services were rendered, and that thereby monies were wrongfully diverted to Overmyer. The indictment identified Jeebs Distributions Services, Inc. ("Jeebs") as one of the allegedly fraudulent service companies.

Prior Civil Bankruptcy Proceedings

The allegations of the indictment with regard to the purported Hadar-Telecasting lease scam closely tracked the findings of the Bankruptcy Court which had adjudicated the Hadar proof of claim, had rejected the claim as fraudulent, and had voided the Hadar-Telecasting leases as shams. *In re D.H. Overmyer Telecasting Co., Inc.*, 23 B.R. 823 (Bank. N.D. Ohio 1982). The findings of the Bankruptcy Court followed an adversary proceeding brought between Hadar and other Overmyer-affiliated companies and the First National Bank of Boston ("FNBB"), Overmyer's primary creditor.

The Immunized Bankruptcy Testimony

During the course of bankruptcy proceedings which preceded the indictment in this case, Overmyer was on five separate occasions required to testify, pursuant to a statutory grant of use and derivative-use immunity, with regard to the Hadar-Telecasting leases, the allegedly fraudulent service company, Jeebs, and various other matters which subsequently formed the basis for his indictment. This testimony was compelled from Overmyer as the principal operating officer of the corporate bankrupts.[2] Pursuant to the provisions of Section 7a(10) of the former Bankruptcy Act (former 11 U.S.C. Section 25(a)(10)), which was then in effect and

[2] Overmyer's initial bankruptcy filing was in November 1973 when a chain of warehouse companies and related entities owned by him entered Chapter 11 in New York. In 1976 Telecasting filed for Chapter 11 in New York, a proceeding which was dismissed in 1980. Telecasting re-filed for Chapter 11 on February 6, 1981, in Cleveland, Ohio.

governed the Overmyer bankruptcy proceedings, Overmyer was granted automatic use and derivative-use immunity for this testimony.

Overmyer was compelled to give immunized testimony concerning the affairs of Telecasting and Hadar on June 10, 1976 (R 169-99),[3] June 11, 1976 (R 200-32), December 9, 1976 (R 279-365), February 4, 1977 (R 366-470) and March 8, 1977 (R 471-533).[4]

During the course of Overmyer's immunized testimony, he was examined, and gave evidence, with regard to the following subjects:

1. During the course of his immunized testimony, Overmyer admitted knowledge of and responsibility for the allegedly fraudulent Hadar-Telecasting leases (R 327, 406-16, 484-92).

2. Overmyer admitted transferring ownership of the allegedly fraudulent leasing company, Hadar, to a Bermuda trust shortly prior to his initial bankruptcy filing (R 484-92).

3. Overmyer gave testimony concerning his knowledge of and participation in the allegedly fraudulent service company contracts entered into between Telecasting and Jeebs (R 175-76, 187, 204-12, 338-40, 343-46, 352-53, 368-70, 461-65).

4. Overmyer admitted transferring ownership of Jeebs to his children (R 175-76, 328).

These matters were directly relevant to the government's case and were incriminatory. Thus, the government charged in the indictment, attempted to prove at trial, and argued in

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[3] The Joint Appendix filed in the court below is cited herein as "R__".

[4] The immunized testimony was given during the course of proceedings in the Telecasting Chapter 11 and other Overmyer corporate bankruptcies pending in the Southern District of New York.

summation that Overmyer's guilt of filing a false proof of claim was established by:

1. his participation in the claimed Hadar-Telecasting lease fraud (Indictment, paragraph 10).
2. his alleged attempt to conceal his control of Hadar by transferring ownership to a Bermuda trust (R 709-10).
3. his alleged looting of Telecasting by causing it to enter into fraudulent service contracts with Jeebs, when in truth no services were actually rendered (Indictment, paragraph 11).
4. his alleged attempt to conceal his control of Jeebs by transferring ownership to his children.

The *Kastigar* Hearing

Pursuant to *Kastigar v. United States,* 406 U.S. 441 (1972), a pre-trial hearing was conducted to determine whether the grand jury presentation had been tainted by any use, direct or indirect, of immunized testimony, and to put the government to its constitutional obligation of proving an independent source for each and every item of evidence presented to the grand jury and to be presented at trial.

The government's presentation at the *Kastigar* hearing consisted of the testimony of the Assistant U.S. Attorney who presented the case to the grand jury, James Lynch, and the three FBI agents successively assigned to the investigation, Gary Hall, Michael Kirkpatrick and William Hann. AUSA Lynch and Agents Hall, Kirkpatrick and Hann all testified that they had not read or reviewed transcripts of Overmyer's immunized testimony, and thus did not believe that they had made any use of the testimony (R 57-58, 69, 89, 107).

The government did not present any further evidence at the *Kastigar* hearing. The prosecution did not identify or trace the source of its grand jury and trial evidence, and made no attempt to establish a legitimate, independent

source for its evidence, other than to deny that it had read the immunized testimony. The government offered no evidence that it was aware of a potential problem concerning immunized testimony, nor did it offer any evidence that it had developed procedures to segregate tainted evidence from non-tainted evidence.

At the hearing it was developed, however, that the government had access to the immunized testimony, and to information potentially derived from the testimony, through at least two sources: (a) oral summaries of immunized testimony were provided to the case agent by attorneys for Overmyer's primary creditor, FNBB; and (b) the FNBB attorneys, who had access to the immunized testimony and used the testimony to prepare for Bankruptcy Court proceedings, provided much of the information which the government utilized to prepare the indictment in this case.

Oral Summaries of Immunized Testimony Provided to the Government

FBI Special Agent Michael Kirkpatrick was the case agent in charge of the Overmyer investigation from October 1982 through September 1983 (R 88). Agent Kirkpatrick testified that on several occasions he was provided with oral summaries of Overmyer Bankruptcy Court testimony by attorneys for FNBB (R 89-99). Agent Kirkpatrick testified that the summaries of Overmyer testimony included both testimony given in the Cleveland Bankruptcy proceedings (which were non-immunized) and testimony given in the New York Overmyer corporate bankruptcies (which were immunized pursuant to Section 7a(10) of the former Bankruptcy Act) (R97-99). AUSA Lynch was present for several of the briefings by the FNBB attorneys (R94).

Agent Kirkpatrick testified that the briefings of testimony he received from the FNBB attorneys caused him to conduct further investigation and develop additional evidence against Overmyer (R 96). Agent Kirkpatrick acknowledged that his

interviews of various witnesses were based, at least in part, upon the briefings he received from the bank attorneys (*Id.*).

Government Investigation Based in Large Part Upon Information Provided by FNBB Attorneys, Who Had Full Access to the Immunized Testimony

The attorneys for FNBB, Overmyer's primary creditor and opponent in the bankruptcy proceedings, had full access to the Overmyer immunized testimony, maintaining copies of the transcripts in their litigation files and utilizing the transcripts during the course of their representation of FNBB in various bankruptcy proceedings. John Silas Hopkins, a member of Baker & Hostetler, counsel to FNBB, was called by the defense as a witness at the *Kastigar* hearing. Mr. Hopkins identified the transcripts of the five immunized Overmyer examinations, and stated his firm had copies of all the transcripts (R 128-32). Mr. Hopkins testified that he personally had read several of the immunized transcripts, and utilized those transcripts during the course of preparation for the Hadar-Telecasting adversary proceeding, and other Bankruptcy Court proceedings (R 128, 131-133). In addition to Mr. Hopkins' use of the transcripts, the transcripts were available in his office's files for review and use by all members of the FNBB trial team (R 129-32). Indeed, the FNBB attorneys read portions of the immunized testimony into the record of the Hadar-Telecasting adversary proceeding. Thus, at a March 26, 1982, hearing, the FNBB attorneys introduced excerpts from Overmyer's immunized March 8, 1977, testimony (R 484-85, 620-24). The excerpted testimony concerned Telecasting's rental of its studio facilities from an Overmyer-related entity. AUSA Lynch testified that it was "possible" that he had reviewed the hearing transcript containing the excerpt of the immunized testimony (R 69).

The FBI agents, AUSA Lynch, and the FNBB attorney all testified that the government used the bank attorneys as a major resource throughout the course of the investigation. Both the government and the bank attorneys acknowledged

that the information developed by the bank attorneys during the course of the civil proceedings was integral to the criminal investigation. Thus, Agent Kirkpatrick stated that one of the first steps he took after being assigned to the Overmyer case in October 1982 was to arrange for full access to the materials developed by the FNBB attorneys (R 89). Mr. Hopkins testified that his firm maintained a "war room" of Overmyer documents, and gave the government unlimited access to these materials (R 140-41).

Mr. Hopkins testified that he, along with other attorneys from his firm, met with the Overmyer prosecutors and investigating agents approximately 30 or 40 times (R 136). AUSA Lynch testified that the purpose of the numerous meetings with the bank attorneys was to receive "some explanation as to matters which I perhaps didn't understand or didn't have complete knowledge of regarding the various fraud allegations . . . . It was to provide really explanation and some guidance as to seeking the source of information regarding the fraud allegation which we were investigating." (R 73-75)

The government acknowledged that every matter covered in the indictment was discussed with the bank attorneys, and that the attorneys provided the government with significant information on every transaction set forth in the indictment. AUSA Lynch testified:

> A. . . . Probably every, just about every subject of the indictment was probably discussed with attorneys for the bank . . . .
>
> Q. And information was brought to you by attorneys from the bank with regard to every aspect of the charge in the indictment?
>
> A. That's right.

(R 80)

Mr. Hopkins testified that the information he and other members of his firm provided to the government was based

at least in part on the immunized Overmyer testimony (R 137-39).

The government acknowledged that the information provided by the bank was used extensively in its investigation, and formed a significant part of its presentation to the grand jury. Agent Hann testified that the information provided him by the bank attorneys was used by him to further his investigation (R 118-19). AUSA Lynch stated that he used the information provided by the bank attorneys to present the case to the grand jury. AUSA Lynch testified:

> Q. Your presentation [to the Grand Jury] was based in least in part upon information which had been imparted to you by attorneys for the bank, is that correct?
>
> A. That question, I suppose it must be answered yes because you're talking about I suppose what information I had developed over the years through various sources of our investigation. So somewhere in the recesses of my mind I must have stored some knowledge gained from the lawyers for the First National Bank of Boston and used that information in the proceeding in the Grand Jury.

(R 81-82)

Defendant took the position at the hearing that the government had failed to meet the burden imposed upon it by *Kastigar,* in that it had failed to establish affirmatively an untainted, independent source for its evidence, both at the grand jury and trial stages (R 161-62). Defendant specifically argued that the government's showing was deficient in that it had made no attempt to identify its grand jury and trial evidence and to trace each item of evidence to a claimed independent source (*Id.*). The government took the position at the hearing that it had satisfied its burden through testimony that the government agents and attorneys had not read or reviewed the immunized transcripts (R 165-67).

Denial of the *Kastigar* Motion

On October 14, 1986, the district court denied defendant's *Kastigar* motion. On March 26, 1990, the Sixth Circuit affirmed denial of the *Kastigar* motion, holding that there existed an independent source for the government's evidence, consisting of: (a) the extensive record and factual findings entered in the civil adversary proceeding which led up to the criminal investigation, and (b) certain non-immunized testimony given by Overmyer in later civil proceedings. Further, the Sixth Circuit held that any use of immunized testimony that did occur would have constituted harmless error.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit, in holding that the government satisfies its *Kastigar* burden by merely identifying a potential independent source, without requiring the government to go further and affirmatively identify and trace its evidence to the claimed independent source, has rejected the two-step approach implicit in *Kastigar*, and specifically adopted by the District of Columbia Circuit—most recently in *United States v. North*—and the Eleventh Circuit.

It is respectfully submitted that the opinion of the Sixth Circuit below represents a substantial departure from the strict requirements imposed upon the government by this Court in *Kastigar v. United States,* 406 U.S. 441 (1972). Heretofore *Kastigar* has been held to require the government to follow a two-step process in order to meet its burden of establishing that there was no use, direct or indirect, of immunized testimony, where an immunized individual is subsequently indicted. The government has traditionally been required to: a) identify an independent source for its evidence, and b) to establish affirmatively that each and every item of its grand jury and trial evidence was in fact derived from the claimed independent source, by identifying that

evidence, and tracing it to the claimed untainted source. It is respectfully submitted that the Sixth Circuit has impermissibly truncated this process, by eliminating the requirement that the government affirmatively trace its evidence to the claimed independent source. The opinion below, in holding that the government satisfies its constitutional obligation by merely pointing to a claimed potential independent source, without demonstrating that its evidence in fact came from the source, it is submitted, is incompatible with *Kastigar*, is in direct conflict with the interpretation of *Kastigar* adopted by the District of Columbia and Eleventh Circuits, and represents a major abridgement of the rights constitutionally accorded immunized defendants by *Kastigar*.

In *Kastigar* this Court considered a constitutional challenge to the use and derivative-use immunity provisions of the Organized Crime Control Act of 1970 (codified at 18 U.S.C. Section 6002). The Court rejected the challenge to the constitutionality of use immunity, holding that a grant of use and derivative-use immunity is constitutionally sufficient to supplant an individual's Fifth Amendment privilege against self-incrimination, and that a grant of transactional immunity was not required in order to override the constitutional privilege. In addition to the substantive holding of the constitutionality of the statute, the Court also established procedural safeguards held to be constitutionally mandated where an individual granted use and derivative-use immunity is subsequently indicted on matters relating to his immunized testimony. The Court held:

> A person accorded . . . immunity . . . and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities . . . . 'Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not

> tainted by establishing that they had an independent, legitimate source for the disputed evidence.' [*citing Murphy v. Waterfront Commission*, 378 U.S. 52 (1964)] This burden of proof, which we reaffirm as appropriate, is not limited to negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460.

Thus, under *Kastigar*, when the government indicts an individual in connection with matters as to which he has given immunized testimony, certain obligations are constitutionally imposed upon the government. Foremost among these constitutional obligations of course is the command that no use, direct or indirect, may be made of immunized testimony in the return of an indictment or prosecution of a defendant.

A corollary of the "no use" rule is the principle that it is the government that has the burden of affirmatively establishing that it has made no use, direct or indirect, of the immunized testimony. The "no use" rule is rendered essentially meaningless unless accompanied by the principle that the government must affirmatively demonstrate that it has in fact made no use of the compelled testimony. Unless the government is required to establish affirmatively an absence of use, direct or indirect, of immunized testimony, the promise explicit in all immunity statutes "is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, concurring).

Kastigar provides the procedure that the government must follow in order to meet its "heavy burden" of proving no use. Initially, the government must show that it had an

untainted independent source for its evidence. Identification of a claimed independent source, however, by itself, is not sufficient to meet the government's burden. Thus, the *Kastigar* Court declared that the government's burden "is not limited to negation of taint," rather, the government has the "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460. Implicit in this language is the proposition that the government must satisfy a two-part test where it seeks to prosecute a previously immunized individual: a) it must identify a truly untainted, independent source, and b) it must affirmatively establish that its evidence—each and every item—is in fact "derived" from the independent source.

In order to establish that its evidence was in fact so derived, the government must identify its evidence, and must, if it can, trace its evidence to the claimed source. Only by affirmatively establishing the source and origin of its evidence can the government establish that in fact its evidence was wholly derived from the claimed source, and that there is thus no taint infecting the indictment or prosecution.

The two-step test implicit in *Kastigar* has been specifically articulated and adopted by the District of Columbia and Eleventh Circuits.

The District of Columbia Circuit most recently had occasion to articulate its view as to the nature of the burden imposed upon the government by *Kastigar* in *United States v. North*, (D.C. Cir. 1990) (slip opinion, July 20, 1990, available on LEXIS, 1990 U.S. App. LEXIS 12106). In vacating Oliver North's conviction and remanding to the district court for the full hearing required by *Kastigar*, the court underscored in the most forceful of terms the fundamental role that the constitutional guarantee against self-incrimination plays in our constitutional system of individual rights. The court stated:

> A predicate to liberal constitutional government is the freedom of a citizen from government compulsion to testify against himself. . . .
>
> Such compulsion is an ageless badge of tyranny, one that the framers and ratifiers of the Constitution were determined to avoid. . . .
>
> Because the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), and because it is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

Slip opinion on LEXIS at 4-5.

Reiterating the command of *Kastigar*, the District of Columbia circuit held that, in order to safeguard these fundamental principles and to hold inviolate the constitutional privilege against self-incrimination, the government is required to make a particularized showing where it seeks to prosecute an immunized individual. The *North* court reviewed the *Kastigar* showing made by the government at the trial level, and found it constitutionally inadequate.

With respect to each grand jury and trial witness, the prosecution in *North* identified an "independent source" for the witness—*i.e.*, it filed with the trial court a list of "leads" for each witness, establishing that it was aware of the existence of and had interviewed each grand jury and trial witness prior to the date of North's immunized testimony. The government argued below, and the district court agreed, that it had satisfied its *Kastigar* burden by identifying the claimed independent source for each witness.

The circuit held, however, that the government's burden is not discharged merely by asserting the existence of an independent source for its evidence. Rather, the government must go further, and demonstrate that its evidence was in fact derived solely from the claimed independent source, and was not impacted in any manner by tainted testimony. This the government failed to do in *North*, and the case was remanded for the "full-blown, item-by-item *Kastigar* hearing" constitutionally required.[5] LEXIS slip opinion at 27.

The court described the nature of the evidentiary hearing required in its view by *Kastigar* thusly:

> On remand, if the prosecution is to continue, the District Court must hold a full *Kastigar* hearing that will inquire into the content as well as the sources of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by establishing that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred. Unless the District Court can make express findings that the government has carried this heavy burden as to the content of all of the testimony of each witness, that testimony can-

[5] In particular, the circuit was concerned by evidence that, though the government learned of the identity of its witnesses independent of the immunized testimony, the witnesses themselves had been exposed to immunized testimony, and the possibility existed that the witnesses' recollections had been refreshed by exposure, direct or indirect, to immunized testimony.

> not survive the *Kastigar* test. We remind the prosecution that the *Kastigar* burden is "heavy" not because of the evidentiary standard, but because of the constitutional standard: the government has to meet its proof only by a preponderance of the evidence, but any failure to meet that standard must result in exclusion of the testimony.

LEXIS slip opinion at 27.

The *North* court recognized that such a hearing might prove burdensome for the government. The circuit court held, however, that any claim of government inconvenience must give way to the vital constitutional principles at stake. The court stated:

> As between the clear constitutional command and the convenience of the government, our duty is to enforce the former and discount the latter.

LEXIS slip opinion at 14.

Under *North*, thus, an immunized defendant subsequently prosecuted in the District of Columbia Circuit is entitled to a full-blown evidentiary *Kastigar* hearing, in which the government must affirmatively establish both a) an independent source for each item of its evidence, and b) that each item of evidence was in fact derived from that source.

Similarly, an immunized defendant indicted in the Eleventh Circuit is entitled to the same exacting set of procedural safeguards. Thus, in *United States v. Hampton*, 775 F.2d 1479, 1485-86 (11th Cir. 1985), the court held that the government's burden is not satisfied merely by identification of a claimed independent source; "rather, the government must go further and affirmatively prove legitimate independent sources for its evidence *and affirmatively establish that none of the evidence presented to the grand jury was derived directly or indirectly from the immunized testimony.*" (emphasis added) In order to make this showing, the government

must "systematically establish an independent source for *each and every item* of evidence which may have been considered by the indicting grand jury." 775 F.2d at 1488 (emphasis added). (It should be noted that the *North* court cited *Hampton* favorably in reaching its decision to remand for a further *Kastigar* showing. *See, e.g., North, supra,* LEXIS slip opinion at 7, 12 and 24.) *Accord, United States v. Gregory,* 730 F.2d 692, 698 (11th Cir. 1984) (government must "show how it acquired all of the evidence admitted below.").

The Sixth Circuit, in affirming the denial of Overmyer's *Kastigar* motion, wholly relieved the government from making the two-part showing implicitly required by *Kastigar* and specifically required in the District of Columbia and Eleventh Circuits.

The government below did not even attempt to meet its burden of tracing each and every item of its evidence—or, indeed, any of its evidence—to an independent source.

The evidence at the *Kastigar* hearing showed that the government had access to immunized testimony, both directly, in the form of oral summaries to Agent Kirkpatrick, and indirectly, through the FNBB attorneys. The evidence further established that investigative use was made of the testimony, both by the government, and by the FNBB attorneys, who in turn shared the fruits of their investigation with the government.

The government's presentation at the *Kastigar* hearing below consisted simply of a denial by the AUSA and the case agents that they had read transcripts of the immunized testimony, and the conclusory assertion by the government that no use had thus been made of the immunized testimony. The Sixth Circuit correctly characterized these conclusory denials as insufficient to meet the heavy burden imposed by *Kastigar.* 899 F.2d at 464, n.12.

The court below, however, held that the government had met its burden by merely pointing to a potential independent source, the adversary proceeding. The government, however, wholly failed to identify its grand jury and trial evidence at the *Kastigar* hearing, and thus made no effort whatsoever to trace its evidence to the claimed source. Rather, the government asserted below, in the most conclusory of terms that *most*, but not all, of its evidence came from the adversary proceedings. The government did not identify particular witnesses and documentary evidence at the hearing, and thus did not even attempt to trace its evidence to the claimed independent source.

It is respectfully submitted that the holding of the court below, by relieving the government of its constitutional obligation to trace each item of its evidence to the claimed independent source, is incompatible with the strict requirements of *Kastigar*. The opinion below will result in a total evisceration of *Kastigar* in the Sixth Circuit. Under the holding below, the government need no longer make any attempt to systematically trace its evidence to an independent source. Rather, it would be deemed sufficient, if the government merely asserted—as the government did below—that its evidence came from a independent source, without any identification of the government's evidence, and without any demonstration that the evidence in fact was so derived. Under the approach taken by the court below, the government satisfies its burden by merely pointing to an independent source, and assuring the court that its evidence came from that source. Absent a tracing by the government of its evidence to the claimed source, a defendant who has been compelled to provide immunized testimony has no assurance that in fact his testimony has not been used against him directly or indirectly, other than the government's good faith. It is precisely such a situation that was declared to be constitutionally impermissible by *Kastigar*. Thus, this Court stated: "A person accorded . . . immunity . . . and subsequently prosecuted, is not dependent for the preservation of

his rights upon the integrity and good faith of the prosecuting authorities." 406 U.S. at 460. This Court held that the only mechanism for subjecting the government's good faith to judicial scrutiny was to require the government not merely to assert an independent source, but in fact to establish affirmatively that its evidence was derived from the claimed independent source. This the government failed to do below.

The approach taken by the court below deprives *Kastigar* of all meaning, and denies immunized defendants prosecuted in the Sixth Circuit any meaningful protection against use of their immunized testimony.

The opinion below is totally at odds with this Court's opinion in *Kastigar* and with opinions of the District of Columbia and Eleventh Circuits interpreting and applying *Kastigar*. It is respectfully submitted that certiorari should be granted in order to resolve this split in the circuits.

II. In holding harmless-error analysis applicable to violation of an immunity grant, the judgment below conflicts with *Santobello v. New York* and the decisions of other circuits mandating judicial relief when the government violates an agreement made with a defendant, notwithstanding showings of inadvertence or immateriality.

The Sixth Circuit reviewed transcripts of the immunized testimony, and found the testimony to be related to the subject matter of Overmyer's prosecution. The court below, however, concluded that only "a minor portion of the information contained in [the immunized transcripts] relates to the later criminal prosecution for filing a false proof of claim." 899 F.2d at 464. The court ruled that "we find this relationship to be so remote that any use would constitute harmless error." *Id.*

Application of a harmless-error analysis to the government's use of immunized testimony is in conflict with this

Court's ruling in *Santobello v. New York*, 404 U.S. 257 (1971), holding that the due process clause requires that the government strictly comply with promises made to defendants.

When defendant Overmyer testified in the bankruptcy proceedings pursuant to an order of the bankruptcy court, the government promised that, in exchange for his truthful testimony, none of that "testimony, or any evidence which is directly or indirectly derived from such testimony given by him shall be offered in evidence against him in any criminal proceeding." Section 7a(10) of the former Bankruptcy Act. In our system of justice, it is beyond cavil that "[a]ny agreement made by the government must be scrupulously performed and kept." *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir.) (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)), *cert. denied*, 457 U.S. 1136 (1982). As the Chief Justice wrote for the Court in *United States v. Apfelbaum*, 445 U.S. 114, 130 (1980), the government grants a witness immunity "in exchange for his compelled testimony," and the government must "ke[ep] its part of the bargain."

Prosecutors' agreements with defendants, and hence this case, are governed by the principles of *Santobello v. New York*, 404 U.S. 257 (1971), where a defendant pled guilty in exchange for the prosecutor's promise not to make any recommendation as to sentence. At the sentencing hearing, a different attorney from the prosecutor's office appeared and, "apparently ignorant of his colleague's commitment," *id.* at 259, recommended the maximum sentence, which the judge imposed. In his opinion for the Court, Chief Justice Burger described the prosecution's breach of promise not as a product of bad faith, but as "an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may explain these episodes, but it does not excuse them." *Id.* at 260. "That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262.

The Court was likewise unpersuaded by the government's argument that the breach of promise was harmless because it had no impact on the judge's sentencing decision: "at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." *Id.* Even though the sentencing judge declared that the prosecutor's recommendation did not "make a particle of difference" in the court's decision, *id.* at 259—a statement this Court accepted at full value, *id.* at 262—the Court unanimously concluded that "the interests of justice" and "appropriate recognition of the duties of the prosecution in relation to promises made" required that the judgment of conviction be vacated, *id.* at 262-63.

Quite apart from the Self-Incrimination Clause, the contractual due process analysis applied by this Court to plea bargains in *Santobello* has been held by many Circuit Courts of Appeals to "appl[y] equally well to promises of immunity from prosecution." *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982). For example, in *Rowe* the Eleventh Circuit sustained a permanent injunction against state prosecution of a witness who had testified for the state in exchange for a promise of transactional immunity.

> When such a promise induces a defendant to waive his fifth amendment rights by testifying . . . or to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise be fulfilled . . . [O]nce the defendant's good faith compliance with the terms of the agreement is established, the state must perform on its side and any attempt by the state to breach the agreement is per se a bad faith prosecution.

Id. The *Santobello* analysis has similarly been applied to the enforcement of immunity agreements by the Courts of

appeals in the Fourth,[6] Fifth,[7] Seventh,[8] and Eighth Circuits.[9]

[6] *United States v. Carter*, 454 F.2d 426 (4th Cir.1972) (*en banc*), *aff'd after remand*, 490 F.2d 1407, *cert. denied*, 417 U.S. 933 (1974), remanded for a hearing on whether the government had broken its plea bargain and cooperation agreement with a witness, in which the government had promised both use and transactional immunity: "if the promise [of immunity] was made to defendant as alleged and defendant relied upon it in incriminating himself and others, the government should be held to abide by its terms" and "the indictment should be dismissed." 454 F.2d at 427-28.

[7] *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979), held that "where a plea, confession or admission is based on a promise of a plea bargain or immunity, the government must keep its promise." *Id.* at 737 (citing *Santobello*). "In that context, the guiding concern is the protection of the defendant's Fifth Amendment privilege against the compulsion of self-incriminating testimony." *Id.* The conviction at issue in *Weiss* was affirmed because the court found that there had been, in fact, no governmental promise not to prosecute and because "no evidence against [the defendant] in this case [was] obtained as a result of his cooperation." *Id.*

[8] *United States v. Brimberry*, 744 F.2d 580 (7th Cir. 1984), relied on *Santobello* in remanding for a hearing on whether the government made derivative use of defendant's testimony to indict and convict him in violation of the use immunity that was part of his plea bargain. It held that if the government had in fact thus breached its agreement, "the indictment must be dismissed." *Id.* at 587-88. See also *id.* at 587 ("It is clear beyond question that, in our system of government, '[a]ny agreement made by the government must be scrupulously performed and kept.' ") (citation omitted).

In *United States v. Lyons*, 670 F.2d 77 (7th Cir.), *cert. denied*, 457 U.S. 1136 (1982), the court of appeals found that "[t]he most serious of appellant's contentions . . . regard[s] use of evidence against him which was derived as a result of leads obtained from his statements during negotiations for immunity. Any agreement made by the government must be scrupulously performed and kept." *Id.* at 80 (citing *Santobello*). The conviction was affirmed only when the court determined that no promise of derivative use immunity had in fact been made by the prosecutor during the interview with the defendant.

[9] *United States v. Brown*, 801 F.2d 352, 355 (8th Cir. 1986), remanded for a hearing on whether the witness had breached and thereby voided his cooperation agreement with the government, in

(*footnote continued on following page*)

In the contrast to those five circuits, the court below disregarded the contractual nature of an immunity grant, and declined to hold the government strictly to its promise, allowing the government to seek refuge in the harmless-error rule upon a showing that a violation of the immunity grant had occurred.

The court below thus did not follow the due process analysis held by this Court to govern agreements between prosecutors and criminal defendants. In *Santobello*, this Court unanimously and explicitly rejected the harmless error exception embraced by the Sixth Circuit; *per se* reversible error was found to lie in the prosecution's inadvertent breach of promise even though the trial court expressly found, and this Court expressly assumed, that this breach did not "make a particle of difference" in the outcome of the case. 404 U.S. at 259; *id.* at 262.[10]

(footnote continued from preceding page)
which the prosecutor had promised use immunity and transactional immunity. The court held that prosecutorial promises of immunity are analogous to the prosecutorial promises made in connection with the plea bargain in *Santobello*, *id.* at 354: "If the district court determines that [the defendant] did not breach the cooperation agreement, fundamental fairness requires the government to uphold its part of the agreement and the district court may enforce the agreement by dismissing the indictment." *Id.* at 355. Alternatively, the court of appeals explained, if the defendant in fact breached the agreement, the government may prosecute him for the transaction in question, but "the government [still] may not use any information obtained, directly or indirectly, from [the defendant] as a result of the cooperation agreement." *Id.*

[10] *See also In the Matter of John Doe*, 410 F.Supp. 1163, 1166 (E.D. Mich. 1976) ("Neither may the government insist that [defendant] demonstrate some prejudice before claiming a violation of his rights in the government's broken promise. No prejudice, apart from that suffered by the administration of justice, was apparent in *Santobello*."). It is irrelevant in a context such as this that the harmless-error inquiry prescribed by Fed.R.Crim.P. 52(a) overrides any contrary supervisory rule "not . . . required by the Constitution or the Congress," *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369, 2373 (1988) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)), since the *Santobello* rule is grounded in the Due Process Clause, not in this Court's supervisory power.

The contractual nature of an immunity grant has been expressly recognized by Congress. Thus, Congress expressly conceived of use immunity as a "bargaining process," [11] a "meeting of the minds between the prosecutor and the witness," [12] and an "exchange of immunity" for testimony,[13] even when the witness had to be summoned by subpoena and ordered to answer under a grant of immunity.[14] Congress understood, that a witness ordered to answer under an immunity statute still has a very real and important decision to make. Overmyer's choice was between, on the one hand, trusting the government's promise of immunity and giving complete and candid testimony, and, on the other hand, remaining silent and risking civil contempt, or testifying but committing perjury. It is for this reason that this Court and others, although not the court below, have always understood a grant of immunity to be an enforceable exchange of promises between government and witness.[15]

By not following the application of *Santobello's* due process principles to prosecutorial promises and agreements outside the plea bargain context, the court below arbitrarily truncated the Due Process Clause and placed the Sixth Circuit in conflict with the holdings of five other circuits. Unlike the nearly unanimous *en banc* panel of the Fourth Circuit Court of Appeals, which followed *Santobello* in

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[11] *Federal Immunity of Witnesses Act: Hearings on H.R. 11157 and H.R.12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 41 (1969) (statement of Will Wilson, Asst. Att'y General, Criminal Division).

[12] *Id.* at 46.

[13] *Id.* at 42.

[14] *Id.*

[15] *See, e.g., United States v. Apfelbaum*, 445 U.S. 114, 130 (1980) (the government grants a witness immunity "in exchange for his compelled testimony"); *United States v. Tramunti*, 500 F.2d 1334, 1342 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) ("The theory of immunity statutes is that in return for his surrender of his Fifth Amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange.").

enforcing promises of immunity, *United States v. Carter*, 454 F.2d at 427-29, the Sixth Circuit failed to recognize that "[t]here is more at stake [here] than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice. . . . " *Id.* at 428. Certiorari is in order to resolve this circuit conflict and to preserve the integrity of immunity promises by the government.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Dated: August 6, 1990
New York, New York

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Sixth Circuit

UNITED STATES of America,
Plaintiff-Appellee,

v.

Daniel H. OVERMYER,
Defendant-Appellant.

No. 89-3696.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 25, 1990.

Decided March 26, 1990.

James C. Lynch, Asst. U.S. Atty. (argued), Cleveland, Ohio, for plaintiff-appellee.

Stanley S. Arkin, Marc Bogatin (argued), Stanley S. Arkin, P.C., New York City, for defendant-appellant.

Before WELLFORD and GUY, Circuit Judges, and HULL,* Chief District Judge.

* The Honorable Thomas G. Hull, Chief Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

WELLFORD, Circuit Judge.

Defendant, Daniel H. Overmyer, appeals his conviction in the United States District Court for the Northern District of Ohio on one count of filing a false proof of claim in bankruptcy in violation of 18 U.S.C. § 152, ¶ 4. Defendant challenges his conviction on two grounds. First, defendant submits that the conviction must be vacated and the indictment dismissed in light of *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Second, defendant submits that the government committed errors in its presentation to the grand jury which affected the fundamental fairness of that proceeding. This case thus presents two issues: (1) whether the finding of the district court that the government satisfied its obligations under *Kastigar* by not relying, directly or indirectly, upon immunized testimony given by Overmyer in prior bankruptcy proceedings is clearly erroneous; and (2) whether the district court abused its discretion by refusing to dismiss the indictment based on alleged prosecuto-

rial misconduct in the grand jury process. Upon review, we conclude that the district court did not commit error, and we, accordingly, affirm.

I.

On January 28, 1986, a grand jury in the Northern District of Ohio returned a nine count indictment against Daniel H. Overmyer charging him with six counts of bankruptcy fraud in violation of 18 U.S.C. § 152, two counts of conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371, and one count of mail fraud in violation of 18 U.S.C. § 1341. Count one of the indictment charged that Overmyer caused Hadar Leasing International Co, Inc. ("Hadar") to file a false proof of claim in the Chapter 11 bankruptcy of D.H. Overmyer Telecasting Co., Inc. ("Telecasting"), in violation of 18 U.S.C. § 152, ¶ 4.

On October 15, 1986, the government began its case against Overmyer. Prior to the submission of the case to the jury, the district court judge, the Honorable Sam H.

Bell, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, dismissed all counts of the indictment except for counts one and three through five. On November 21, 1986, the jury returned a verdict of "guilty" on count one and "not guilty" on counts three through five.

On April 22, 1987, the district court granted Overmyer's post-trial motion for acquittal pursuant to Rule 29(c). On February 10, 1989, this court reversed the acquittal, reinstating the jury verdict. *See United States v. Overmyer*, 867 F.2d 937 (6th Cir.1989).

On July 21, 1989, pursuant to remand, the district judge sentenced Overmyer to three years imprisonment (the first six months in custody), three years probation and a $5,000 fine. Overmyer appeals from the conviction and sentence.

II.

Starting in 1947 with a single warehouse in Toledo, Ohio, defendant Overmyer gradually expanded his operations, and by 1973,

operated public warehouses in 32 states. In addition to his warehouse operations, Overmyer founded WDHO–TV (otherwise referred to as Telecasting) in Toledo in 1966. From its inception, Telecasting followed a policy of leasing its broadcast equipment from an affiliated entity. From 1976 through 1981, Hadar was the Overmyer-affiliated entity from which Telecasting leased its equipment.[1]

In 1973, due in part to problems servicing its loan indebtedness, the Overmyer warehouse companies and related entities entered Chapter 11 bankruptcy in New York. In 1976, Telecasting filed for Chapter 11 in New York.[2] This proceeding was dismissed in 1980. Telecasting refiled for Chapter 11 on February 6, 1981 in Cleveland, Ohio. Overmyer filed for personal bankruptcy in New York in May, 1982.

On March 28, 1981, the bankruptcy court for the Northern District of Ohio awarded the entire operation of Telecasting to the First National Bank of Boston (the "Bank"), its major creditor. From that

time on, Overmyer had no control over the operations of Telecasting.

Following Telecasting's takeover in 1981, the Bank employed accountant Howard Klein to review the records of Telecasting. Klein reviewed the records of Telecasting and Hadar to determine the account balances between the two entities. Klein prepared a summary schedule reflecting the initial lease between Hadar and Telecasting in 1976 and all the additional leases entered into between Telecasting and Hadar.

Klein found that from 1978 through 1981 Telecasting was making lease payments to Hadar which bore no relationship to any particular lease terms. After reviewing all the documents, Klein concluded that as of January 1981, Telecasting had overpaid Hadar in accordance with the lease terms, approximately $500,000. Furthermore, Klein's analysis showed that as of August 31, 1979, Telecasting had overpaid Hadar $473,000.

On August 7, 1981, Hadar, which was also in Chapter 11 bankruptcy,[3] filed a

proof of claim for $859,481.80 in the Telecasting bankruptcy proceedings.[4] In addition to filing a proof of claim, Hadar brought a civil action against Telecasting. Overmyer personally intervened in this action, and the matter proceeded to trial on February 22, 1982. See *In re D.H. Overmyer Telecasting Co.*, 23 B.R. 823 (Bankr. N.D.Ohio 1982), for a full account of these transactions.

The bankruptcy judge therein issued a 116–page opinion containing extensive findings of fraud in the various aspects of the Telecasting and Hadar operations. Discussed at length by Judge Ray in his opinion were: "The Hadar Lease Fraud in General"; "Particular Hadar Lease Scams"; "The Hundred East Leases" and "The Inter–Company Account Between Telecasting and Hadar". Judge Ray concluded, among other final determinations, that: "(18) The Hadar leases are shams designed to conceal the looting of Telecasting by Mr. Overmyer; ... (50) Hadar's proof of claim is fraudulent and is rejected." *Id.* at 930–

932. Relying in part upon the findings of the bankruptcy court, the government obtained an indictment against Overmyer on January 28, 1986.

III.

A. *The Indictment*

Count one of the indictment charged Overmyer and Edmund Connery with the fraudulent presentation of a proof of claim in the bankruptcy of Telecasting. The claim made in the amount of $859,481.80 was based on purported liabilities incurred by Telecasting in connection with the lease arrangements it had with Hadar.

The indictment alleged that the Hadar-Telecasting leases were "shams," designed solely for the purpose of transferring money out of Telecasting to other Overmyer-controlled entities. Specifically, the indictment charged that, commencing with the January 1976 transfer of the Telecasting equipment leases to Hadar, Overmyer devised a scheme whereby he "caused Tele-

casting to make payment on these and various other leases with Hadar which had the effect of transferring monies from Telecasting to Hadar for no apparent consideration." [5] The government alleged that the payments made by Telecasting to Hadar bore no particular relationship to the purported leases with Hadar, many of the payments made by Telecasting to Hadar being a direct result of amounts needed by Overmyer for himself or for his other entities.

Count one also charged that Hadar's proof of claim was false, and that Hadar improperly billed Telecasting for certain installation costs and equipment which was never installed. The government contended that Telecasting had "overpaid Hadar for any purported leasing obligations which it might have had and owed Hadar."

B. *The Kastigar Hearing*

Overmyer filed a motion to dismiss count one alleging that the government improperly used his immunized testimony given in the bankruptcy proceedings of

D.H. Overmyer Co., Inc. and Telecasting in obtaining the indictment. On September 26, 1986, the district court conducted a hearing to determine whether the government's presentation to the grand jury had been tainted by any use, direct or indirect, of Overmyer's immunized testimony.

The government's presentation at the *Kastigar* hearing consisted of the testimony of the Assistant U.S. Attorney who presented the case to the grand jury, James Lynch, and the three FBI agents successively assigned to the investigation, Gary Hall, Michael Kirkpatrick, and William Hann. Assistant U.S. Attorney Lynch and agents Hall, Kirkpatrick and Hann all testified that they had not read or reviewed transcripts of Overmyer's immunized testimony and did not believe that they had made any use of the testimony.[6] The government's witnesses all stated that the investigation was based upon the bankruptcy proceedings and the opinion filed in *In re D.H. Overmyer Telecasting Company, Inc.*

The defendant called attorney John Silas Hopkins, the Bank's trial counsel at the bankruptcy proceedings. Hopkins testified that he had met many times with government representatives in connection with the investigation of Overmyer. Before the 1982 adversary proceedings, Hopkins indicated that he worked on a case involving the *First National Bank of Boston v. Daniel Harrison Overmyer* in the Superior Court in Massachusetts in December of 1980. In that proceeding, Hopkins took Overmyer's deposition. Hopkins also took part in Overmyer's deposition during the Hadar adversary proceedings in Cleveland, Ohio. During the course of this deposition, Hopkins used a small portion of the 1976 proceedings [7] to refresh Overmyer's recollection as to one question.

Hopkins testified that the only testimony given by Overmyer prior to the adversary proceedings in 1982, which he considered important, was the testimony he gave in the deposition in the Suffolk Superior Court in Massachusetts. Hopkins indicated

that the other transcripts were of very little importance, but were read simply for completeness. When asked whether he imparted information to the government with respect to the review of Overmyer's testimony, Hopkins testified that he couldn't think of anything specifically, but stated that it was possible that some information came from transcripts of depositions (i.e., depositions given in the *Boston* case and the deposition given by Overmyer in the Hadar adversary proceeding, neither of which contained immunized testimony). Furthermore, with respect to the 1976 proceedings, Hopkins testified that there was nothing in the transcript which would have been of interest to the government's investigation of the fraud allegations, and further, if anyone had asked him, that he would have told them as much.

The district court denied Overmyer's motion after the hearing. The court held:

> In this action, the evidence presented at the hearing of September 25, 1986, demonstrates that neither the Govern-

ment prosecutors involved in these proceedings, or [sic] the three FBI agents who investigated the charges in the indictment ever directly utilized any prior immunized testimony of Mr. Overmyer. Instead, the record affirmatively shows that with the exception of the testimony given on June 10 and 11, 1976 by Mr. Overmyer, the Government was not even aware of the existence of any immunized testimony until after this motion was filed. As to the June 10 and 11 testimony, the Government has demonstrated that such testimony has also not been utilized in the investigation or presented to the grand jury.

It should be noted that the court has reviewed with care the transcripts of all the prior testimony of Mr. Overmyer at issue and *finds that this testimony has little relevance to the claim made in the indictment. This action concerns the alleged violations of law which occurred after the D.H. Overmyer Telecasting Company, Inc. filed bankrupt-*

cy in the United States Bankruptcy Court in the Northern District of Ohio on February 6, 1981. On the other hand, the transcripts of Mr. Overmyer's testimony involved primarily events which occurred years earlier and are not related to this indictment. The Government has demonstrated that the evidence utilized in the investigation and presented to the grand jury primarily involves the issues raised in Judge Ray's opinion in *In re D.H. Overmyer Telecasting Co., Inc.*, 23 B.R. 823 (Bankr.N.D. Ohio 1982), and not any earlier proceedings.

Accordingly, the court finds that the Government has not utilized the immunized testimony of Mr. Overmyer in any manner that would violate the defendant's constitutional or statutory right against self-incrimination. Therefore, the defendant's motion to dismiss the indictment is denied.

(Emphasis added).

IV.

A. *Immunity*

Overmyer was examined on five separate occasions during the course of the New York bankruptcy proceedings of D.H. Overmyer Co. and Telecasting. Section 7(a)(10) of the former Bankruptcy Act provided in relevant part:

> The bankrupt shall .... at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning their conducting of his business, the cause of his bankruptcy, his dealing with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except

> such testimony as may be given by him in the hearing upon objections to his discharge....

11 U.S.C. § 25(a)(10) (1976).[8] Under this provision, an individual bankrupt who submitted to examination received use and derivative use immunity in a subsequent criminal case for testimony during certain bankruptcy proceedings concerning the circumstances of a failed business. *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir.1983), *United States v. Beery*, 678 F.2d 856, 860 (10th Cir.1982). Likewise, an officer who appeared for examination on behalf of a corporate debtor received immunity under section 7(a)(10).[9] *Rogers*, 722 F.2d at 559–60. Therefore, Overmyer's testimony at the New York bankruptcy hearings of D.H. Overmyer Co. and Telecasting is protected.

Grants of use and derivative use immunity prohibit the use of compelled testimony and evidence derived therefrom in later criminal proceedings. *Kastigar*, 406 U.S. at 453, 92 S.Ct. at 1661. The Supreme Court stated that a grant of immunity "im-

poses on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460, 92 S.Ct. at 1665 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)).[10] In order to meet the burden of proof under *Kastigar*, the government must establish by a preponderance of the evidence that the evidence used against the defendant was obtained from a legitimate, independent source. *Rogers*, 722 F.2d at 560 (citing *United States v. Romano*, 583 F.2d 1, 7 (1st Cir.1978) and *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974)). This burden upon the government is a "heavy" one. *Kastigar*, 406 U.S. at 461, 92 S.Ct. at 1665.

B. *Standard of Review*

The standard of review of a trial court's determination as to the government's satisfaction of its burden under *Kastigar* is whether the trial court's decision is clearly erroneous. *United States v. Serrano*, 870

F.2d 1, 19 (1st Cir.1989); *Rogers*, 722 F.2d at 560; *United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980).

Prior to trial, Overmyer moved for a hearing pursuant to *Kastigar* in order to determine whether the grand jury presentation had been tainted by any use, direct or indirect, of his immunized testimony and to put the government to its constitutional obligation of proving an independent source for every item of evidence presented to the grand jury and to be presented at trial. The district court held a hearing on September 26, 1986 and later issued an order concluding that Overmyer's immunized testimony had not been utilized by the government "in any manner that would violate [Overmyer's] constitutional or statutory right against self-incrimination."

The district court noted that Overmyer's immunized testimony had "little relevance to the claims made in the indictment," and that the evidence utilized in the govern-

ment's investigation and presented to the grand jury "primarily involve[d] the issues raised in Judge Ray's opinion in *In re D.H. Overmyer Telecasting Co.* . . . and not any earlier proceedings."

Overmyer introduced six transcripts allegedly containing immunized testimony. Some of these contain testimony from proceedings before the bankruptcy court for the Southern District of New York.[11] One includes the identification of Overmyer and does not contain testimony. In its brief, the government concedes that four of Overmyer's *Kastigar* exhibits contain testimony given by Overmyer which is immunized by the former Bankruptcy Act. The government, however, contends that the immunized testimony is not related to the issues involved in the prosecution of Overmyer for presenting a false claim in the bankruptcy of Telecasting in the Northern District of Ohio in August of 1981.

We find Overmyer's argument that his testimony in 1976 and 1977 related to matters which had not occurred, namely the

filing of the bankruptcy proof of claim in 1981, to be without merit. Although the government evidence presented in this case did trace the history, background and relationship that Overmyer had with his various businesses, his testimony in 1976 and 1977 did not reveal the pattern of fraud demonstrated by the relationship between Hadar and Telecasting which resulted in the filing of the proof of claim in 1981. An analysis of the transcripts reveals that the district court was not in error in concluding that Overmyer's *Kastigar* transcripts contained little relating to the issues in the criminal case.

C. *Exhibit Analysis*

Overmyer's *Kastigar* Exhibit H–A contains transcripts of testimony from the New York bankruptcy proceedings of D.H. Overmyer, Inc. in 1976. There is, however, very little substantive testimony by Overmyer in Exhibit H–A. Overmyer responded *twenty-six* times with the answer of "I don't know." Overmyer testified as to the

relationships between several entities, namely Jeebs, Weather Vane, HMO trust, and Danville Private Rental Homes, Inc. In the second part, Overmyer testified that Jeebs was a "management corporation" providing "management services" consisting of "accounting, legal, [and] business advice of all kinds" to various Overmyer entities including Telecasting. Overmyer stated that he was a consultant to Jeebs.

Overmyer's *Kastigar* Exhibit H–C is another 1976 transcript from an examination in the Telecasting bankruptcy. Overmyer testified therein about the ownership of Jeebs, the nature of the payments by Telecasting to Jeebs including a monthly service fee, his role as consultant to Jeebs, and the value of services rendered by Jeebs to Telecasting.

Overmyer's *Kastigar* Exhibit H–D is further 1977 testimony in the Telecasting bankruptcy. Overmyer gave responses with regard to the relationship between Jeebs and Telecasting, payments from Telecasting to Jeebs for rental space, the nature of services provided to Telecasting

by Jeebs, and the identity of the individuals performing those services. Overmyer also testified that the leases of equipment between Telecasting and Trucking (the former name of Hadar) were for "all kinds of equipment," and that Trucking purchased the lease contracts from Intermodal.

Overmyer's *Kastigar* Exhibit H–E contains testimony from a later hearing in the Telecasting Chapter 11 proceeding in 1977. At this hearing, Overmyer explained that the equipment at Telecasting was leased from Trucking, that the stock of Trucking was in trust for his children, and that Trucking collected approximately $21,000 per month from Telecasting for the equipment leases.

None of the testimony given in these proceedings indicates fraud or suggests in any way that Overmyer was making use of the lease arrangements between Telecasting and Trucking for his personal gain. Moreover, there was no suggestion or questioning regarding the status of payments between Telecasting and Trucking

that would reflect that Trucking was overpaying Telecasting. Given that a minor portion of the information contained in these exhibits relates to the later criminal prosecution for filing a false proof of claim, we find this relationship to be so remote that any use would constitute harmless error, especially in light of the lengthy and substantial testimony of Overmyer, which was not immunized. *United States v. Shelton*, 669 F.2d 446, 464 (7th Cir.), *cert. denied*, 456 U.S. 934, 102 S.Ct. 1989, 72 L.Ed.2d 454 (1982); *Rogers*, 722 F.2d at 560; *Serrano*, 870 F.2d at 16.

Even if some violation of *Kastigar* occurred, and we are not persuaded that it did, we find that the government established, by its requisite burden, a legitimate and independent source for its evidence used in the criminal prosecution of Overmyer.[12] First, the extensive opinion by Judge Ray identifying the extensive factual basis for the court's findings that there was civil fraud on the part of Hadar in connection with the bankruptcy proceed-

ings was a prime and legitimate source. Second, Overmyer gave unprotected testimony on four separate occasions in 1980 and 1981 in which he testified about the various aspects of his role in the Hadar-Telecasting lease arrangement. Third, various others who testified at and took part in the adversary bankruptcy proceedings provided information to the government, none of which we find to be based on Overmyer's immunized testimony. We, therefore, conclude that the findings of the trial court with regard to the *Kastigar* hearing were not clearly erroneous.

V.

Finally, Overmyer claims that there were three errors in the grand jury process, the cumulative effect of which rendered the grand jury proceedings fundamentally unfair and which require the dismissal of the indictment.

First, Overmyer argues that the prosecutor made a misleading suggestion

to the grand jury that Overmyer had a prior criminal record. The standard of review of a district court's refusal to dismiss an indictment is whether there was an abuse of discretion. *United States v. Powell*, 823 F.2d 996, 1001 (6th Cir.1987). Because of the well-accepted principle that grand jury indictments are presumed valid, we exercise extreme caution in dismissing an indictment for alleged grand jury misconduct. *United States v. Jones*, 766 F.2d 994, 1001 (6th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *Beatrice Foods Co. v. United States*, 312 F.2d 29, 39 (8th Cir.), *cert. denied*, 373 U.S. 904, 83 S.Ct. 1289, 10 L.Ed.2d 199 (1963). Courts do not encourage tampering with the grand jury indictment even where faulty instructions are given. *United States v. Felice*, 481 F.Supp. 79 (N.D.Ohio 1978), *aff'd*, 609 F.2d 276 (6th Cir.1979).

A U.S. Attorney elicited testimony before the grand jury that Overmyer had been indicted and tried on an unrelated criminal charge in Louisville, Kentucky.

Although this information was revealed in the questioning of Morton S. Robson, there is no indication in the record that the failure to inform the grand jury that Overmyer had been acquitted was deliberate or was delivered in a manner calculated to inflame the grand jury. The action by the prosecution in this case, though certainly not endorsed, does not appear to reach the level of misconduct present in the cases cited by Overmyer. *See United States v. Hogan*, 712 F.2d 757 (2d Cir.1983) (involving the presentation of extensive hearsay and double hearsay before the grand jury including one defendant's involvement in two murders and corrupt activities which accusations appeared to have been made in order to depict defendants as bad persons rather than to support additional charges); *United States v. Vetere*, 663 F.Supp. 381 (S.D.N.Y.1987).

Second, Overmyer argues that the prosecutor provided the grand jury with erroneous and incomplete instructions with respect to the offense of presenting a false

proof of claim. Although the instructions given to the grand jury may not have been crystal clear, they were sufficient to inform the jury of the issues involved, especially with respect to the primary issue of willfulness. If read together with the indictment, the grand jury instructions adequately informed the grand jury of the elements of the offenses.

Finally, Overmyer complains that less than twelve of the grand jurors who voted to indict heard all of the evidence. This, however, has not been recognized as a requirement for the proper return of an indictment. *See United States v. Cronic*, 675 F.2d 1126, 1130 (10th Cir.1982), *rev'd on other grounds*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645, 649 (9th Cir.1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981).

In sum, Overmyer has not demonstrated the type of prejudice to justify either dis-

missal of the indictment or reversal of his conviction.

We therefore AFFIRM.

1. Prior to 1976, Telecasting leased its equipment from an Overmyer entity known as Intermodal Systems Leasing, Inc. ("Intermodal"). In April 1976, Hadar, then known as D.H. Overmyer Trucking, Inc. ("Trucking"), assumed all the leases of Telecasting's equipment from Intermodal, and Telecasting began making lease payments to Hadar.

2. After Telecasting's bankruptcy filing in August of 1976, Overmyer made it clear that he was in complete charge of Telecasting as Chairman, Chief Executive Officer, and Vice President of Finance. Overmyer told Telecasting's president, Mr. Dorfner, that he put Telecasting in Chapter 11 to protect the company from the continuing threats of Telecasting's major creditor, despite the fact that in 1976 Dorfner believed that the television station was producing operating profits.

3. Hadar filed a bankruptcy petition in the Southern District of New York in 1981, which was immediately transferred to the bankruptcy court in the Northern District of Ohio.

4. The proof of claim was based upon the various broadcast equipment leases between Hadar and Telecasting, a $400,000 deposit and $249,116.18 in installation costs for the leased equipment.

5. The proof of claim, on the other hand, stated that the consideration for the debt was "[l]eases of personal and real property [and] equipment installation charges." The second page of the Hadar claim provided a schedule purportedly to show the lease charges made by Hadar and payments received from Telecasting for the period from 1979 through 1981.

6. The government introduced an affidavit from Assistant U.S. Attorney Ann Rollin, who had responsibility for the investigation prior to Mr. Lynch. Ms. Rollin denied ever having reviewed a transcript of the June 10, 1976 immunized testimony by Overmyer. The Assistant U.S. Attorney Richard Lillie, who assisted Mr. Lynch at the trial, stated for the record that he had never read the immunized transcripts.

7. *See* the reference in n. 2.

8. This statutory provision has been modified substantially by the new Bankruptcy Code. *See* 11 U.S.C. § 344 (1979). Immunity is no longer automatically available without a claim of the privilege against self-incrimination.

9. The immunity provided by Section 7(a)(10) is identical with the general federal immunity statue, 18 U.S.C. § 6002, and is thus coextensive with the fifth amendment privilege against self-incrimination. *Rogers*, 722 F.2d at 560; *see also Kastigar v. United States*, 406 U.S. at 462, 92 S.Ct. at 1666.

10. In *Murphy*, involving federal use of testimony given before a state court, the Supreme Court held:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, *to matters related* to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an *independent, legitimate source* for the disputed evidence.

378 U.S. at 79 n. 18, 84 S.Ct. at 1609 n. 18 (emphasis added). A defendant seeking to avoid prosecution first must show that the immunized testimony at issue is *related* to the crime for which he is charged. *See Beery*, 678 F.2d at 863 ("The district court should first require Beery to demonstrate that he was required to submit to an examination at the bankruptcy proceedings covered by § 25(a)(10) *concerning matters relating to the federal prosecution.* If such a showing is not made by defendant, the convictions should be reinstated." (emphasis added)).

11. Exhibit H–A contains testimony given by Overmyer in the bankruptcy proceeding of the D.H. Overmyer Co., Inc. in the Southern District of New York. Exhibits H–C, H–D, and H–E contain testimony given in 1976 and 1977 in the bankruptcy proceedings of Telecasting pending in the Southern District of New York. Exhibit H–F is a transcript of the proceedings in the bankruptcy court in the Northern District of Ohio containing a brief portion of the testimony given by Overmyer in the March 1977 Telecasting bankruptcy proceedings.

12. All government personnel involved in the investigation and prosecution of Overmyer testified that they had not reviewed any of the immunized transcripts of Overmyer's testimony from 1976 and 1977. These conclusory statements, however, are not sufficient proof of the legitimate and independent sources necessary to satisfy the burden under *Kastigar*. *Beery*, 678 F.2d at 863; *United States v. Nemes*, 555 F.2d 51, 55 (2d Cir.1977).

Order and Opinion of the United States District Court for the Northern District of Ohio, Eastern Division

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
1986 OCT 14 PM 1:54
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES OF AMERICA

Plaintiff

-v-

DANIEL H. OVERMYER,
EDWARD M. CONNERY

Defendant

CASE NO. CR86-13

JUDGE SAM H. BELL

ORDER

Presently before this court is the defendant, Daniel H. Overmyer's motion to dismiss the indictment on the grounds that immunized testimony given by this defendant in various bankruptcy proceedings has been improperly utilized by the Government. On September 25, 1986, the court conducted a hearing on this motion pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972). After considering the evidence obtained at that hearing and the record, the court for the reasons which follow finds that the defendant's motion must be denied.

In the motion, Mr. Overmyer states that beginning with the first of the Overmyer corporate bankruptcy in November, 1973, through successive corporate bankruptcies, the defendant testified before various bankruptcy courts on numerous occasions. The defendant contends that this testimony was immunized pursuant to the statute then in effect, 11 U.S.C. §25(a)(10), which provides in pertinent part:

> The bankrupt shall . . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the

> cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or *any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding,* except such testimony as may be given by him in the hearing upon objections to his discharge . . . (Emphasis added).

At the hearing on September 25, 1986, the defendant introduced the transcripts of four different occasions when Mr. Overmyer testified in various bankruptcy proceedings conducted in the Southern District of New York while the above statute was in effect. On each of these occasions the defendant testified as the corporate officer of the debtor corporation. Therefore, the defendant had testified under a grant of use immunity and this court must determine if the Government has utilized this testimony in any manner which would violate *Kastigar v. United States, supra.*

The Supreme Court has held that the Government, when it prosecutes a witness who testified under a grant of use immunity, has the burden of showing that the evidence to be utilized against that individual was obtained from an independent legitimate source. The Supreme Court has stated that "[t]his burden of proof . . . is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States, supra,* 406 U.S. at 460. The Court describes this burden on the Government as a "heavy" burden of proof. *Id.* at 461.

In *United States v. Beery,* 678 F.2d 856 (10th Cir. 1982), the debtor-defendant was convicted of concealing assets from the bankruptcy trustee under 18 U.S.C. §152. On

appeal the debtor claimed that the Government violated his statutory right not to have his earlier compelled testimony used against him in the grand jury proceedings. The Tenth Circuit held that the conviction should be vacated and the action remanded to the trial court with instructions as to whether the defendant's grant of immunity under 11 U.S.C. §25(a)(10) was violated by any use of the compelled testimony before the grand jury. The trial court was further instructed that if any of the evidence before the grand jury was improperly derived from the defendant's earlier compelled testimony the indictment should be dismissed unless the use of the testimony was harmless. *United States v. Beery, supra,* 678 F.2d at 860.

On remand, the *Beery* trial court found that the defendant's right under *Kastigar* had not been violated by any use of the compelled testimony by the Government. Thereafter, the Tenth Circuit had the opportunity to review the sufficiency of this determination in *United States v. Beery,* 752 F.2d 499 (10th Cir. 1985) (*Beery* II). In *Beery* II the court *summarized* the trial court proceedings as follows:

> On June 14, 1983, the district court held an evidentiary hearing. Evidence was submitted at the hearing by both the defendant and the government. The government called two witnesses: 1) a former FBI agent who had headed the investigation resulting in defendant's conviction, and 2) the trustee in bankruptcy who had testified before the grand jury and at the criminal trial. Based upon the evidence introduced at this hearing, the court concluded that the government did not directly or indirectly use the defendant's bankruptcy testimony as a lead to the evidence that was subsequently used at the grand jury hearing and at the trial. The court, therefore, reinstated the defendant's convictions.

United States v. Beery, 752 F.2d at 500. Based upon the evidence in the record the Tenth Circuit held that the trial

court's finding was sufficient and the reinstated conviction was affirmed.

In this action, the evidence presented at the hearing of September 25, 1986, demonstrates that neither the Government prosecutors involved in these proceedings, or the three FBI agents who investigated the charges in the indictment ever directly utilized any prior immunized testimony of Mr. Overmyer. Instead, the record affirmatively shows that with the exception of the testimony given on June 10 and 11, 1976 by Mr. Overmyer, the Government was not even aware of the existence of any immunized testimony until after this motion was filed. As to the June 10 and 11 testimony, the Government has demonstrated that such testimony has also not been utilized in the investigation or presented to the grand jury.

It should be noted that the court has reviewed with care the transcripts of all the prior testimony of Mr. Overmyer at issue and finds that this testimony has little relevance to the claims made in the indictment. This action concerns the alleged violations of law which occurred after the D. H. Overmyer Telecasting Company, Inc. filed bankruptcy in the United States Bankruptcy Court in the Northern District of Ohio on February 6, 1981. On the other hand, the transcripts of Mr. Overmyer's testimony involve primarily events which occurred years earlier and are not related to this indictment. The Government has demonstrated that the evidence utilized in the investigation and presented to the grand jury primarily involves the issues raised in Judge Ray's opinion in *In re D. H. Overmyer Telecasting Co., Inc.*, 23 B.R. 823 (Bankr. N.D. Ohio 1982), and not any earlier proceedings.

Accordingly, the court finds that the Government has not utilized the immunized testimony of Mr. Overmyer in any manner that would violate the defendant's constitutional or statutory right against self-incrimination. There-

fore, the defendant's motion to dismiss the indictment is denied.

IT IS SO ORDERED.

/s/ Sam H. Bell

SAM H. BELL
U.S. DISTRICT JUDGE

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing

No. 89-3696

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL H. OVERMYER,

Defendant-Appellant

FILED
MAY 10 1990
LEONARD GREEN, Clerk

ORDER

BEFORE: WELLFORD and GUY, Circuit Judges; and HULL,* Chief Judge, United States District Court.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

LEONARD GREEN, CLERK

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*Hon. Thomas G. Hull sitting by designation from the Eastern District of Tennessee

(2)

No. 90-247

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard in determining that the government had satisfied its burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), to show that it did not improperly use petitioner's immunized testimony from bankruptcy proceedings in bringing the instant prosecution.

2. Whether the court of appeals properly adverted to the harmless error doctrine in the circumstances of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 899 F.2d 457. A previous opinion of the court of appeals, reversing the district court's post-verdict judgment of acquittal, is reported at 867 F.2d 937. The opinion of the district court (Pet. App. A32-A36) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1990. A petition for rehearing was denied on May 10, 1990 (Pet. App. A37). The petition for a writ of certiorari was filed on August 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of submitting a false claim in bankruptcy, in violation of 18 U.S.C. 152.[1] The district court granted a post-trial motion for acquittal, but the court of appeals reversed. 867 F.2d 937 (1989). On remand, petitioner was sentenced to three years' imprisonment (all but six months of which were suspended), to be followed by three years' probation, and he was fined $5,000. The court of appeals affirmed. Pet. App. A1-A31; 1 C.A. App. 34.

1. The evidence at trial, the sufficiency of which is not challenged here, established that petitioner caused Hadar Leasing International Co., Inc. (Hadar) to file a false proof of claim in the Chapter 11 bankruptcy proceeding of D.H. Overmyer Telecasting Co., Inc. (Telecasting), a company that petitioner had previously controlled. Pet. App. A3.

In 1966, petitioner founded Telecasting in Toledo, Ohio, to operate a television station. Telecasting leased its broadcast equipment from an affiliated company controlled by petitioner. From 1976 through 1981, Hadar was the affiliated company that leased equipment to Telecasting. Pet. App. A4-A5.

Beginning in 1973, petitioner became involved in a series of bankruptcy proceedings. In 1973, a warehouse company controlled by petitioner, together with its related entities, entered Chapter 11 bankruptcy

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[1]Petitioner was also charged with five other counts of bankruptcy fraud (18 U.S.C. 152), two counts of conspiracy to commit those offenses (18 U.S.C. 371), and one count of mail fraud (18 U.S.C. 1341). The district court dismissed five of those other counts, and the jury acquitted on three counts. Pet. App. A3-A4.

proceedings in New York. In 1976, Telecasting also filed for Chapter 11 bankruptcy protection in New York; that proceeding was dismissed in 1980. In February 1981, Telecasting again filed for Chapter 11 bankruptcy protection, this time in Cleveland, Ohio. The next month, the bankruptcy court in the Northern District of Ohio awarded the operation of Telecasting to Telecasting's major creditor, the First National Bank of Boston. Thereafter, petitioner had no control over Telecasting. Pet. App. A5-A6.

An accountant hired by First National Bank of Boston to review Telecasting's records determined that, from 1978 through 1981, Telecasting had made lease payments to Hadar that bore no relationship to the terms of the lease. The accountant concluded that by the end of August 1979 Telecasting had overpaid Hadar approximately $473,000 and that by January 1981 Telecasting had overpaid Hadar by approximately $500,000. Pet. App. A6.

On August 7, 1981, Hadar filed a claim for $859,-481.80 in the Telecasting bankruptcy proceedings. The proof of claim rested on broadcast equipment leases between Hadar and Telecasting, a $400,000 deposit, and some $249,000 in claimed installation costs. Pet. App. A6-A7, A29 n.4. In 1982, the bankruptcy judge issued a 116-page opinion, in part of which he found extensive fraud in the dealings between Hadar and Telecasting. *Id.* at A7-A8. He determined that the Hadar leases were "designed to conceal the looting of Telecasting" by petitioner and that Hadar's proof of claim was "fraudulent." *Id.* at A7.

2. In January 1986, the government obtained an indictment against petitioner. Count 1 of the indictment charged petitioner and a co-defendant with the fraudulent presentation of Hadar's proof of claim in the 1981 Telecasting bankruptcy proceeding. The in-

dictment alleged that the Hadar-Telecasting leases were "shams" and were designed solely to funnel money from Telecasting to other entities controlled by petitioner. Count 1 also charged that the proof of claim was false and that certain equipment, for which installation charges were assessed, had never been installed. Pet. App. A8-A9.

Prior to trial, petitioner moved to dismiss the indictment on the ground that the government had improperly used his immunized testimony to obtain the indictment. Petitioner claimed that he had given immunized testimony in 1976 and 1977 in the course of the 1973 warehouse company bankruptcy proceedings and the 1976 Telecasting bankruptcy proceedings, and that the government had used that testimony in obtaining the false claim indictment. Pet. App. A9-A10.[2]

In September 1986, the district court conducted a hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972), to determine whether the government had made any direct or indirect use of petitioner's testimony. The government presented the testimony of the Assistant U.S. Attorney who had presented

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[2] The bankruptcy statute at the time provided that persons testifying at certain bankruptcy proceedings automatically received use immunity for their testimony. 11 U.S.C. 25(a)(10) (1976). The bankruptcy statute was subsequently revised. Immunity is now provided under 18 U.S.C. 6001 *et seq.* See 11 U.S.C. 344.

In support of his motion to dismiss the indictment, petitioner submitted six transcripts. Five were from 1976 and 1977; one was from 1982, but the pertinent portion of that transcript was an excerpt from a 1977 transcript already included as a separate exhibit. Additionally, one of the five transcripts from 1976 and 1977 did not contain any testimony by petitioner. Pet. App. A19, A31 n.11, A33; Gov't C.A. Br. 9, 16.

the case to the grand jury and the three FBI agents assigned to the case. Each witness testified that he had not read petitioner's immunized testimony and did not make any use of the testimony. Each witness also said that the government's investigation was based on the 1981 Telecasting bankruptcy proceedings and the bankruptcy court's 1982 opinion in that case. Pet. App. A10.[3]

In response, petitioner called John Silas Hopkins, a lawyer for the First National Bank of Boston, as a witness. Hopkins testified that he had met with the government many times in connection with the investigation of petitioner. On behalf of First National Bank, Hopkins had taken part in two civil actions involving petitioner (in 1980 and 1982), and had taken petitioner's deposition twice in those proceedings. Hopkins had read petitioner's immunized testimony for purposes of completeness, but considered it unimportant.[4] Asked whether he had imparted information to the government about petitioner's prior testimony, Hopkins said that he might have imparted information to the government from petitioner's non-immunized deposition testimony, but that, in his view, there was nothing in the transcripts of the 1976 proceedings that would have been of interest to the government, and that, if asked, he would have said as much. Pet. App. A11-A12.

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[3] Another prosecutor initially assigned to the investigation submitted an affidavit stating that she likewise had not read petitioner's immunized testimony. A third prosecutor, who assisted at trial, made the same representation on the record. Pet. App. A10, A29 n.6.

[4] During one deposition, Hopkins used a small portion of the 1976 proceeding to refresh petitioner's recollection on one question. Pet. App. A11.

The district court denied petitioner's motion. The court found that the government had not used petitioner's immunized testimony in the investigation or the presentation of the case to the grand jury. The court determined that, with one exception, the prosecutors and the FBI agents had not even been aware of petitioner's prior testimony. With regard to that exception, the court found that the government had demonstrated that the immunized testimony was not "utilized in the investigation or presented to the grand jury." Pet. App. A35. The court also reviewed petitioner's immunized testimony and concluded that it had "little relevance" to the criminal case but instead was concerned with events that occured several years prior to the time involved in the indictment. *Ibid.*

3. Petitioner renewed his immunity claim on appeal. The court of appeals concluded that the district court correctly found that petitioner's 1976 and 1977 bankruptcy testimony had little or no bearing on whether Hadar's 1981 proof of claim was fraudulent, because petitioner's immunized testimony "did not reveal the pattern of fraud demonstrated by the relationship between Hadar and Telecasting which resulted in the filing of the proof of claim in 1981." Pet. App. A20. Analyzing the exhibits submitted by petitioner at the *Kastigar* hearing, the court determined that "[n]one of the testimony given in these proceedings indicates fraud or suggests in any way that [petitioner] was making use of the lease arrangements between Telecasting and Trucking [Hadar's former name] for his personal gain," *id.* at A22; the court emphasized that "there was no suggestion or questioning regarding the status of payments between Telecasting and Trucking that would reflect that Trucking was overpaying Telecasting,"

id. at A22-A23. The court also found that, although a minor portion of the transcripts "relates to the later criminal prosecution for filing a false proof of claim, we find this relationship to be so remote that any use would constitute harmless error, especially in light of the lengthy and substantial testimony of [petitioner], which was not immunized." *Id.* at A23. Finally, the court found that the government had satisfied its burden under *Kastigar* of establishing a legitimate independent source for the evidence used at petitioner's trial. The court pointed out that the government had the following independent sources of information: the 1982 opinion by the bankruptcy judge; petitioner's own non-immunized testimony on four separate occasions in 1980 and 1981; and other persons who provided information to the government. The court found that none of the latter information was based on petitioner's immunized testimony. *Id.* at A23-A24.[5]

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[5] The court of appeals also rejected petitioner's claims of government misconduct and other errors in the proceedings before the grand jury. Pet. App. A24-A27. Petitioner does not renew those claims in this Court.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the court of appeals applied an incorrect standard in making its *Kastigar* determination. Contrary to his claim, the decision below is correct and does not conflict either with *Kastigar* or with any decision by any other court of appeals.

In *Kastigar*, this Court held that a grant of use immunity under 18 U.S.C. 6002 prohibits the use of compelled testimony and evidence derived from that testimony in later criminal proceedings. 406 U.S. at 453. Accordingly, when a person who testifies under a grant of use immunity is indicted for matters that relate to his immunized testimony, the "prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

Petitioner claims that the courts below failed to require the government to adhere to that standard because the courts did not require the government to make a line-by-line showing of an independent source for each item of evidence that was introduced. Pet. 19-20. In support of that claim, petitioner relies on *United States* v. *North*, No. 89-3118 (D.C. Cir. July 20, 1990), slip op. 44-45, petition for rehearing pending, No. 89-3118, and *United States* v. *Hampton*, 775 F.2d 1479, 1485-1488 (11th Cir. 1985). Whatever the correctness of the *North* and *Hampton* decisions, however, this case is entirely distinguishable from those cases. In this case, both the court of appeals and the district court explicitly determined that the immunized testimony was largely irrelevant to the criminal charge at issue. See Pet. App. A20 ("[T]he district court was not in error in

concluding that [petitioner's] *Kastigar* transcripts contained little relating to the issues in the criminal case."); *id.* at A35 ("[T]he court has reviewed with care the transcripts of all the prior testimony of [petitioner] at issue and finds that this testimony has little relevance to the claims made in the indictment. * * * [T]he transcripts * * * involve primarily events which occurred years earlier and are not related to this indictment.").[6] Neither *North* nor *Hampton* contains such a determination. Indeed, in *North*, it was undisputed that the immunized testimony at issue related to the charges in the indictment, slip op. 2-3; *United States* v. *Poindexter*, 698 F. Supp. 300, 302 (D.D.C. 1988), rev'd *sub nom. United States* v. *North*, *supra*; the court remanded for a determination whether the immunized testimony affected the witnesses' testimony in the grand jury and at trial. Slip op. 26-36, 42-45. In *Hampton* the court reversed specifically because it found that "new information contained in the immunized testimony * * * may have furthered the state and federal investigation." 775 F.2d at 1486. Thus, far from representing "a total evisceration of *Kastigar*" (Pet. 20), the court of appeals' decision in this case simply reflects a determination that the immunized testimony was essentially irrelevant to the criminal charge against petitioner.[7]

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[6] It is settled that, "absent the most exceptional circumstances," this Court will not disturb "factual determinations in which the district court and the court of appeals have concurred." *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

[7] The *North* and *Hampton* decisions are readily distinguishable for other reasons as well. In *North*, the court of appeals considered a situation that it regarded as involving "immunized testimony * * * so broadly disseminated that interested parties study it and even casual observers have some

2. Petitioner also argues (Pet. 21-27) that the court of appeals incorrectly invoked the harmless error doctrine. As noted, the court held that the relationship between the immunized testimony and the criminal prosecution was "so remote that any use would constitute harmless error." Pet. App. A23. Petitioner contends that the court of appeals erred in applying harmless error analysis to his claimed *Kastigar* violation. Every court of appeals that has considered the question has held that a *Kastigar* violation is subject to harmless error analysis; indeed, that point is specifically recognized in the two decisions relied on by petitioner for the first point in his petition. See *North*, slip op. 9, 45; *Hampton*, 775 F.2d at 1489 n.51. See also *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Gallo*, 859 F.2d 1078, 1082-1084 (2d Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *id.* at 1090 (Van Graafeiland, J., concurring); *United States* v. *Shelton*, 669 F.2d 446, 464 (7th Cir.), cert. denied, 456 U.S. 934 (1982); *United States* v. *Rogers*, 722 F.2d 557, 560-561 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984); *United States* v. *Beery*, 678 F.2d 856, 860 & n.3, 863 (10th Cir. 1982); *United States* v. *Byrd*, 765 F.2d 1524, 1529 n.8, 1532 (11th Cir.

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notion of its content" (slip op. 24-25) and in which "many grand jury and trial witnesses were thoroughly soaked in [the defendant's] immunized testimony" (*id.* at 26). In *Hampton*, the court of appeals concluded that federal investigators received and reviewed state investigative files without knowing that those files contained immunized testimony, and that the investigators subsequently used the state materials for much of their investigation. The government then failed to show an independent basis for much of its evidence. 775 F.2d at 1480-1490. Nothing comparable is present in this case.

1985); *United States* v. *Gregory*, 730 F.2d 692, 698 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

Rather than addressing the decisions applying harmless error analysis to claimed *Kastigar* violations, petitioner invokes *Santobello* v. *New York*, 404 U.S. 257 (1971), and subsequent cases that address the right to enforcement of a plea bargain or a cooperation agreement with the government. Petitioner's reliance on those decisions is misplaced for several reasons. First, the statutory conferral of immunity —and accompanying legal duty to testify—is not analogous to the "bargains" in the decisions cited by petitioner. See *United States* v. *Gallo*, 859 F.2d at 1090 (Van Graafeiland, J., concurring) (The defendant "had no choice whether to accept [the immunity]; he was required to testify. This is not the stuff of which contracts are made. This case clearly is distinguishable from those in which promises of immunity or lighter sentences are made in exchange for agreements to plead or cooperate. * * * In those cases, the typical contractual requirements of offer and acceptance are present. Here, we have neither.").[8] Second, three of the decisions cited by petitioner involve a governmental promise of *transactional* immunity—which, of course, is more than the Fifth Amendment requires (*Kastigar*, 406 U.S.

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[8] Petitioner's claim that, in fact, he faced a voluntary choice —testifying truthfully, entering into civil contempt, or perjuring himself (Pet. 26)—is unavailing. Unlike the defendants in the "bargain" cases, petitioner's only choice was whether to obey the law or not. Petitioner's cited references (Pet. 26 & nn.11-15) to statutory immunity as an "exchange" in the legislative history and in *United States* v. *Apfelbaum*, 445 U.S. 114 (1980), recognize that immunity serves to displace the witness's Fifth Amendment privilege, but do not suggest that the "exchange" is in any way voluntary on the part of the witness.

at 453), and which would be violated by the institution of *any* prosecution.[9] Third, and most fundamentally, petitioner misapprehends the meaning of a finding of "harmless error." An error of constitutional dimension is harmless if the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Petitioner's protestations of unfairness fail to appreciate the significance of a harmless error determination, and the burden that is necessary to sustain it.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See *United States* v. *Brown*, 801 F.2d 352 (8th Cir. 1986); *Rowe* v. *Griffin*, 676 F.2d 524 (11th Cir. 1982); *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972). Two other decisions cited by petitioner—*United States* v. *Weiss*, 599 F.2d 730 (5th Cir. 1979), and *United States* v. *Lyons*, 670 F.2d 77 (7th Cir.), cert. denied, 457 U.S. 1136 (1982)—hold that there was no violation of a government promise or agreement at all.

[10] It is also notable that three of the decisions cited by petitioner (*Rowe* v. *Griffin*, *supra*; *United States* v. *Lyons*, *supra*; and *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984)) are from circuits that have explicitly found *Kastigar* errors to be subject to harmless error analysis. See *United States* v. *Shelton*, *supra*; *United States* v. *Byrd*, *supra*.

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